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Supreme Court of the United States

No. 329 - 330

OCTOBER TERM, 1949.

MORRIS KLEIN AND HARRY BURKE,
PETITIONERS,

VS.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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OCTOBER TERM, 1949.

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VS.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Morris Klein and Harry Burke, Petitioners, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Eighth Circuit, in the cases of Morris Klein, Appellant, vs. United States of America, Appellee, No. 13656 and Harry Burke, Appellant, vs. United States of America, Appellee, No. 13657 (which cases were consolidated and heard as one appeal), entered on July 21, 1949, affirming the judgments of the United States District Court for the Western District of Missouri.

OPINIONS BELOW.

The trial court filed a memorandum and order on August 9, 1947, overruling defendants' motion to dismiss and overruling in part defendants' motion for a Bill of Particulars. This memorandum and order appears on pages 13 to 23 of the Record. No other opinion was filed by the trial court. The opinion of the Court of Appeals is not yet reported but appears at pages 638 to 649 of this Record.

JURISDICTION.

The judgments of the Court of Appeals sought to be reviewed was entered on July 21, 1949 (R. 638, 649, 650). Petitioners timely filed a joint and separate petition for rehearing (R. 661). Said petition for rehearing was denied August 15, 1949 (R. 661). The jurisdiction of this Court is invoked under Title 28, U. S. C. A., Sec. 1254(1). See also, Rule 37 (b) of the Federal Rules of Criminal Procedure, promulgated by the Court February 8, 1946.

QUESTIONS PRESENTED.

1. Whether all State party primaries, at which a party nominee for member of Congress is to be chosen, are to be brought under Federal control and supervision by holding applicable thereto Section 19 of the Criminal Code (18 U. S. C. A. 51).

2. Whether the Missouri Democratic Party Primary of August 6, 1946, was an "integral part" of the subsequent general election in Missouri held in November of that year within the meaning of *United States* v. *Classic*, 313 U. S. 299, so that interference with the effective choice

of the voters at said primary would make applicable Section 19 of the Criminal Code (18 U. S. C. A. 51) as being violative of the rights of citizens to "elect" their senators and "choose" their representatives in Congress guaranteed them by Article I, Section 2 and Amendment XVII of the Constitution of the United States.

3. Whether Section 19 of the Criminal Code, purporting to penalize conspiracies "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States" is sufficiently specific to embrace party primaries when the application thereto is not express but must be arrived at by implication.

4. Whether the admission in evidence against petitioners of the voting records on the backs of the registration affidavits found in Government's Exhibits 1 and 2, and the names allegedly copied from poll books, Government's Exhibits 6 and 7, as evidence that fraudulent votes by alleged impersonators were cast without producing as a witness any alleged impersonator or anyone who claimed to have seen a fraudulent vote cast, violates Petitioners' rights under Amendments V and VI of the United States Constitution, providing that in criminal prosecutions the accused shall enjoy the right to be confronted with and cross examine the witnesses against him.

5. Whether it was permissible to infer from the fact 43 illegal votes were cast out of a total of 295 votes cast that a conspiracy was established and Petitioners were parties to it, when there were many disconnected and divergent persons, organizations and interests working in the primary and there was no direct evidence that any

illegal votes were cast by any alleged impersonator, or that Petitioners had any connection therewith.

6. Whether the trial court erred in refusing to direct verdicts of acquittal for each of the Petitioners for the want of substantial evidence to sustain convictions against them.

7. Whether the holding testimony one was registered to vote *prima facie* established he was a qualified voter did not shift the burden of proof to defendants and misconstrue and misapply the law of Missouri to the effect that the mere fact one is a registered voter in Missouri is insufficient to make a *prima facie* case and carry to the jury the issue in a criminal case as to his being a qualified voter.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitution of the United States, Article I, Section 2; Amendments V, VI and XVII.

Section 19 of the Criminal Code (18 U. S. C. A. 51).

Missouri Constitution, 1945, Article VIII, Section 2.

Revised Statutes of Missouri, 1939—

Section 4355.

Section 11534. (set out in text)

Section 11538. (As amended by 1944 Laws (Extraordinary Session) p. 22.)

Section 11546.

Section 11563.

Section 11569.

Section 11584.
Section 12118.
Section 12138.
Section 12139.

With the exception of Sec. 11534, R. S. Mo., 1939, they appear in the appendix, pp. 30-41.

STATEMENT.

On July 11, 1947, a joint indictment in one count was filed against the Petitioners, and also William D. Wilson, John Melham, and Frank L. Holmes in the United States District Court for the Western Division of the Western District of Missouri, charging them with conspiring among themselves, and with persons unknown, to deprive qualified voters in the 10th precinct of the 1st ward in Kansas City, Missouri, of the right to cast their votes, and have them counted as cast for United States Senator and Representative in Congress, by casting, counting and returning illegal votes in the Missouri Party Primary Election of August 6, 1946 (R. 1-6). To this indictment all defendants filed a motion to dismiss the indictment on the constitutional grounds hereinafter discussed and on the grounds the indictment as to each of the defendants failed to state facts sufficient to constitute an offense against the United States (R. 7-9). Defendants also filed a motion for a Bill of Particulars (R. 9-12). The Court, in a written Opinion and Order, overruled the motion to dismiss the indictment and sustained in part and overruled in part the motion for a Bill of Particulars (R. 13-23). At the close of the Government's evidence, the Court directed verdicts of acquittal for defendants, Wilson and Melham (election judges and the only election officials indicted) but refused requests for directed verdicts of acquittal requested by Petitioners

and Holmes (R. 34-36). Petitioners and defendant Holmes were found guilty (R. 37, 52-54).

Petitioners and Holmes filed a joint motion for new trial, which was sustained as to Holmes, but overruled as to Petitioners (R. 38-46, 51-52). Petitioners then appealed to the United States Court of Appeals for the Eighth Circuit (R. 55-57).

Petitioners' appeals were on a number of grounds, including violation of their constitutional rights, errors in rulings on evidence, errors in refusal and giving of instructions to the jury and the insufficiency of the evidence to make a submissible case of conspiracy or the Petitioners' connection therewith. The constitutional questions were raised at the first opportunity and kept alive by motion to dismiss the indictment (R. 7-9) and by objections to the evidence (R. 99-100), motions for directed verdicts of acquittal (R. 34-36) motion for new trial (R. 42, 44, 45), and motion for rehearing in the Court of Appeals (R. 651-660).

The opinion of the Court of Appeals overruled these contentions and entered judgment of affirmance accordingly (R. 637-649). The opinion fails adequately to state the facts upon which many of the asserted errors are based. Detailed references to the record are therefore made throughout.

The evidence tended to show the following: The Missouri Party Primary held on August 6, 1946, was participated in by only two parties, Democrats and Republicans (R. 112, Gov. Exh. 5). There was a lot of interest in this primary. It attracted national attention. Certain sections of the Fair Employment Practice Act were in issue. The 10th precinct of the 1st ward was a strong union precinct and also had many colored people (R. 144-145, Gov. Exh. 5). The C.I.O. and A.F.L. labor

unions took an active part—but were not for all the same candidates (R. 140). The congressional candidates, Walsh, Axtell, Slaughter and Reeves had as many workers as they could get (R. 141). The National Association for the Advancement of the Colored Race took an active part (R. 141).

Petitioner Klein was the new democratic precinct captain (R. 407, 414). He arranged for some workers to get out the democratic voters and also arranged for two automobiles to haul voters to the polls (R. 326, 327, 534). He served all day as inside challenger and was inside the polls most of the day (R. 407, 469, 470, 480, 485, 495). He distributed "you have not voted" cards to some of the workers for use in checking up on the voters and getting out the democratic vote (R. 432).

Petitioner Burke was the former democratic precinct captain who had been displaced by Klein (R. 376). Burke was hostile to Klein (R. 376, 392). He had worked this precinct for twenty years and on Primary day automatically went to this precinct to work (R. 364, 383). He took no orders from Klein or anyone else. He worked with Klein, not for Klein (R. 383, 393).

Counsel admitted the vault of the Election Commissioners had been blown open by unknown persons and the ballots and poll books for this precinct were missing (R. 66, 67).

The Government introduced in evidence (Gov. Exh. 6) a group of cards with names allegedly copied from the poll books before their disappearance (R. 114). Thirty six persons whose names were listed on these cards testified they did not go to the voting place to vote (R. 610). Six voters appearing at the polls were told a vote had been cast in their names but upon protesting were per-

mitted to vote again (R. 610-611). A vote was cast in the name of another voter who testified he left the polls and did not vote (R. 628). Thus there was evidence of forty three votes cast by impersonaters out of a total of 295 votes cast (R. 143, 628). As there were 398 Registered voters in the precinct, it appears no votes were cast in the names of 103 of the registered voters (Gov. Exh. 3, Exh. Bk. III, p. 1). No impersonater, or alleged impersonater, testified and no one testified to seeing an impersonater cast a vote. There was testimony of some ghost voting in other precincts but the Government's evidence shows only one time when ghost voters came to this precinct and that time their offer was refused and they left without casting any votes (R. 451).

The trial court directed verdicts of acquittal for defendants, William D. Wilson and John Melham, who acted as judges of election in this precinct at this primary (R. 30, 31, 523).

The only evidence tending to incriminate Petitioner Burke was the testimony of special agents, Parish and Roberts, as to alleged oral admissions made to them by Burke when they interviewed him. Such testimony tended to show Burke told them he took one Harold L. Rast to the polls and they were told Rast's name had been voted (R. 378, 379, 387). The Government later put Rast on the stand and he denied he knew Burke, denied Burke took him to the polls and denied he was told his name had been voted (R. 425, 426). Said special agents also said Burke told them he had contacted a couple named Johnson (whose names were voted later) about 6:30 and learned they were not going to vote (R. 384, 363). The Johnsons did not identify nor correctly describe Burke (R. 285, 286). The special agents testified that Burke denied to

them any knowledge of the fact votes were later cast in the names of the Johnsons (R. 384, 385).

The jury returned a verdict of guilty against the Petitioners (R. 37, 629). The sentences (R. 52-54) were affirmed by the United States Court of Appeals which filed an opinion (R. 638-649) and entered judgment accordingly August 15, 1949 (R. 649-650).

SPECIFICATIONS OF ERROR TO BE URGED.

The Court of Appeals erred:

1. In holding the Missouri Party Primary of August 6, 1946, was an integral part of the subsequent general election held in November of that year so as to bring it under the protection of Section 19 of the Criminal Code (18 U. S. C. A. 51).

2. In holding Section 19 of the Criminal Code (18 U. S. C. A. 51) was sufficiently specific to embrace within its protection state party primaries when the application thereto is not express but must be arrived at by implication.

3. In admitting in evidence against Petitioners the voting records on the back of the registration affidavits found in Government's Exhibits 1 and 2, and the names allegedly copied from the poll books (Government Exhibits 6 and 7) as evidence that fraudulent votes were cast by impersonaters without producing witnesses of voting by said alleged impersonaters thereby depriving petitioners of the right to be confronted by and cross examine the witnesses against them in violation of Amendments V and VI of the United States Constitution.

4. In refusing to direct verdicts of acquittal for defendants Klein and Burke for the want of substantial evidence to sustain convictions.

5. In holding that, from the fact 43 illegal votes were cast out of a total of 295 votes cast, the inference was justified that a conspiracy existed, although there was great interest in the primary and there were many disconnected and divergent persons, organizations and interests working in the primary and there was no direct evidence any vote was cast by an impersonater.

6. In holding there was substantial evidence to convict petitioner Burke when the alleged oral admissions offered and relied upon by the Government were destroyed by later completely exculpatory statements, also appearing in the Government's testimony.

7. In holding the fact of registration *prima facie* established one as a qualified voter and it would be presumed that the persons the evidence tended to show had been prevented from voting were qualified voters because there was no evidence they were not such, the Court erroneously shifted the burden of proof to the defendants and decided an important question of local law in a way probably in conflict with local decisions.

REASONS FOR GRANTING THE WRIT.

(1) The ruling of the Court of Appeals herein, if permitted to stand, will bring under federal control all state party primaries at which a party nominee for member of Congress is to be chosen.

The Court of Appeals held that the fact the vote in a primary election determines the name of the candidate of a political party for member of Congress to appear on the ballot at the general election is sufficient to bring the primary under Federal Control (R. 642, 643).

The effect of that decision is to put all state party primaries at which a party nominee for member of Con-

gress is to be chosen under Federal Control. It goes far beyond the decisions of this Court hereinafter discussed under the next succeeding point. The holding of the Court of Appeals is so revolutionary in character and of such Great Public Interest and importance that if the law is to be so extended we submit it should be done by this Court after full presentation and careful study and consideration.

(2) The decision of the court below is in conflict with the decision of this court in the case of United States v. Gradwell, 243 U. S. 232, 61 S. Ct. 1031, and if allowed to stand will extend federal control far beyond any decisions of this court.

The charge is based on Section 19 of the Criminal Code (18 U. S. C. A. 51); the theory is that the rights of citizens to vote for a candidate for a party nomination for the office of Representative or Senator in Congress are guaranteed by Article I, Section 2 and Amendment XVII of the Constitution of the United States. These constitutional provisions provide that such Representatives shall be "chosen" by the people and that such Senators shall be "elected" by the people.

The determinative question is whether the Democratic Party Primary of August 6, 1946, was an "integral part" of the subsequent general election in November of that year.

Prior to the *Classic case, infra,* it had always been ruled that a primary was not an election within said constitutional provisions. We believe a solution depends upon the correct interpretation of the following decisions:

U. S. v. *Gradwell,* 243 U. S. 476 (West Virginia primary).

Newberry v. *U. S.,* 256 U. S. 232 (Michigan primary).

U. S. v. *Classic,* 313 U. S. 299 (Louisiana primary).

The Newberry case ruled that a charge of conspiracy under Section 37 of the Criminal Code, to violate the Federal Corrupt Practices Act, by means of excessive campaign contributions made in a Republican party primary in Michigan, stated no federal offense.

The Gradwell case ruled that "even if it be admitted that a general primary should be treated as an election within the meaning of the Constitution, which we need not and do not decide, such admission would not be of value in determining the case before us because of some *striking unusual features* of the West Virginia law under which the primary was held, out of which this prosecution grows" (243 U. S. l. c. 487).

The Classic case ruled that certain distinctions in the facts (alleged and judicially known) and in the Louisiana primary law, rendered interference with rights of voters participating in said primary an "interference with the effective choice of the voters at the only stage of the election procedure where their choice is of significance, since it is at the only stage when such interference could have any practical effect on the ultimate result, * * *" (313 U. S. l. c. 314).

The Classic case ruled that, by reason of certain unusual facts and unusual provisions of the Louisiana law, under which the primary was held, said primary was an "integral part" of the election. These controlling distinctions were:

1. The winner of the Democratic primary invariably won at the general election. This was alleged in the indictment and of said fact the court took judicial notice.

2. The state law made provision for the name of an independent candidate on the ballot at the general

election, but "an unsuccessful candidate at the primary may not offer himself as a candidate at the general election and * * * votes for him may not lawfully be written into the ballot or counted at such election."

Therefore, the majority opinion ruled:

"In fact, as alleged in the indictment, the practical operation of the primary in Louisiana is * * * to secure the election of the Democratic primary nominee * * *. Interference with the right to vote in the Congressional primary * * * is thus, as a matter of law and in fact, an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance, since it is at the only stage where such interference could have any practical effect on the ultimate result" (313 U. S. l. c. 313-4).

The majority opinion, not only did not overrule the Gradwell case, it, in fact, placed its stamp of approval on the ruling there made on the facts there found. The opinion further reads:

"To withdraw from the scope of the statute the effective interference with the constitutional right of choice, because other wholly different situations not now before us may not be found to involve such an interference, cf. *United States* v. *Bathgate*, 246 U. S. 200; *United States* v. *Gradwell*, 243 U. S. 476, is to say that acts plainly within the statute should be deemed without it because other hypothetical cases may later be found not to infringe the constitutional right with which alone the statute is concerned" (313 U. S. l. c. 324).

The reference to the *Gradwell case, supra,* in the Classic opinion, as an instance of "wholly different situations," that do not involve "such an interference" with an election as to bring such situation within the constitutional rights protected, render the Gradwell case particularly important.

The *"striking unusual features"* of the Gradwell case, which removed the West Virginia primary from being ruled an election were:

> 1. "* * * only candidates for Congress belonging to a political party which polled *three percent* of the votes * * * could be voted for in this primary and thereby * * * only Democratic and Republican candidates could be and were voted for, while candidates of the Prohibition and Socialist parties were excluded * * *" (243 U. S. l. c. 487-8).
>
> 2. There were also excluded "independent voters, who declined to make oath that they were 'regular and qualified members and voters' of one of the greater parties" (243 U. S. l. c. 488).
>
> 3. "Even more notable is the provision of the law that after the nominating primary, candidates, *even persons who failed at the primary,* may be nominated by certificate signed by not less than *five per cent* of the entire vote polled at the last preceding election" (243 U. S. l. c. 488).

As further evidence that the above distinctions were controlling, we quote from the dissenting opinion in the Classic case:

> "The opinion of the Court stresses, as does the indictment, that the winner of the Democratic primary in Louisiana invariably carries the general election. Hence, it is argued that interference with the right to vote in such primary is 'as a matter of law and in fact an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance' and that the 'primary in Louisiana is an integral part of the procedure for the popular choice' of representatives. By that means, the Gradwell case is apparently distinguished. But I do not think it is a valid distinction for the purpose of this case" (313 U. S. l. c. 340).

We submit that the facts and state law applicable to the Missouri Primary mentioned in the indictment clearly distinguish the situation here found and that thereby the ruling in the Classic case is not controlling. But if the court should disagree with us we submit the majority opinion in the Classic case is wrong and the minority opinion written by Mr. Justice Douglas and concurred in by Mr. Justice Black and Mr. Justice Murphy, announce the sound and true rule and should be followed in this case.

We believe the Supreme Court used the phrase "integral part" of an election advisedly. Other authorities as to the meaning of that phrase are:

In the case of *Tebeau* v. *Ridge*, 261 Mo. 547, 170 S. W. 871, the Court said (l. c. 874):

> "For 'integral,' the books say, means 'lacking nothing of completeness.' Webster's Dictionary."

1. The Missouri Primary prohibits voters not "known to affiliate" with the party whose primary is held, from voting for any candidate seeking the nomination of that party for any office.

Sec. 11563, R. S. Mo., 1939, reads:

> "No *person shall be entitled to vote* at any primary unless a qualified elector of the precinct and duly registered therein, if registration thereat be required by law, and *known to affiliate with the political party named at the head of the ticket he calls for* and attempts to vote or obligates himself to support the nominees of said party at the following general election."

Sec. 11584, R. S. Mo., 1939, reads in part:

> "* * * Any act declared an offense by the general laws of this state concerning caucuses and elections

shall, also, in like case, be an offense in all primaries, * * *;"

Sec. 4355, R. S. Mo., 1939, reads in part:

"Every person who shall * * * vote at any such election knowing that he is not a qualified voter and is *not entitled to vote,* * * * shall be deemed guilty of a felony. * * *"

The exclusions are, manifestly, more drastic than those of the West Virginia Primary law considered in the Gradwell case.

2. Any person may become a candidate at an election in Missouri by being nominated by only two per cent of the electors in the territory involved. This even includes candidates who were defeated for party nominations.

Sec. 11534, R. S. Mo., 1939, reads:

"Certificate to Be Signed by Voters, When—The certificate of nomination of a candidate selected otherwise than by a primary shall be signed by electors resident within the district or political division for which the candidate is presented, to a number equal to two per cent of the entire vote cast at the last preceding election in the state, the county or other division or district for which the nomination is made; Provided, that said signers shall declare in said certificate that they are *bona fide* supporters of the candidate sought to be nominated and have not aided and will not aid in the nomination of any other candidate for the same office."

The time within which a candidate nominated by electors must file such certificates is no impediment to one who has been defeated for a party nomination to become a candidate at the general election by being so nominated.

Sec. 11538, R. S. Mo., 1939, as amend. by 1944 Laws, Mo. (Extraordinary Session), p. 22.

Reads:

> "Certificates of nominations filed with the Secretary of State shall be filed not more than ninety and not less than seventy days before the day fixed by law for the election of the person in nomination. * * *"

Illustrating: The election that followed the 1946 primary was held on November 5, 1946; a candidate for a party nomination and defeated on August 6, 1946, had until August 27, 1946, to file such certificates of nomination by electors. Any candidate that has any chance of becoming the "choice" of the people for Congress on November 5th, certainly could procure certificates of nomination by two percent of his constituents in 21 days.

In Missouri, unlike Louisiana, the nominee of the Democratic Party is not invariably elected. Such fact was not alleged in the within indictment. It was alleged in the indictment considered in the Classic case.

No such allegation could truthfully be made in the within indictment. This court judicially knows that both United States Senators from Missouri are Republicans; that the Democratic nominee for Congress from the 5th Congressional District of Missouri was defeated by his Republican opponent in November, 1946.

In the case at bar the trial court entered an opinion in overruling the motion to dismiss (R. 13-23). Error intervened, we believe, in this opinion in the following respects:

1. The meaning of the word *"integral"* is not accurately applied. The Supreme Court in the Classic case, we think, used the word advisedly. An *integral part* is a part that is *necessary* to completeness, *i. e.*, a complete election.

2. The trial court's opinion (R. 18) reads:

> "All candidates for elective offices are nominated at such primaries (Sec. 11546, R. S. Mo., 1939)."

The statute cited does so read, but Art. 5, Ch. 76, R. S. Mo., 1939, as early as 1912, was held not to repeal Section 11534, R. S. Mo., 1939, providing that candidates may be nominated by certificates of voters.

State ex rel. Punch v. *Kortjohn*, 246 Mo. 34, 150 S. W. 1060, 1062-63 (*en banc*).

In this case the candidates of the Progressive Party in 1912 were ruled entitled to have their candidates on the ballot at the general election. They were so entitled because (1) they were duly nominated by electors and (2) they were duly nominated by the party committee of the newly organized Progressive Party.

Recently the Supreme Court of Missouri has rendered an opinion clarifying the law relative to this subject.

State ex rel. Gipe v. *Nelson*, 213 S. W. 2d 905 (*en banc*).

Here the court said (l. c. 907):

> "Certainly the plain purpose of the 1909 Primary Act was to give a completely free and open opportunity to any one who wanted to be a candidate for any office, whether as a candidate of an existing political party or not."

We submit that the *Gipe case, supra*, rules the Missouri Primary Law to be such that:

1. Anyone, whether or not he was previously defeated for a party nomination, may become a candidate at the general election by being nominated by certificate of electors equal to only two per cent of the electors in the territory encompassed by his candidacy.

2. Anyone may file for the nomination on the ticket of any party, irrespective of the percentage of the total vote cast by that party at previous elections. If such candidate is unopposed, such mere filing causes his name to be placed on the ballot at the general election. The name of such unopposed candidate for the party nomination is not even properly on the primary ballot (213 S. W. 2d l. c. 907). Where, however, there is opposition, such candidate must receive the majority of the votes of the members of his party participating in the primary, in order to become such party nominee at the general election.

3. The winner of such party nomination does not thereby eliminate the opponents he defeated in the primary. He merely wins the nomination of his party and any or all of his primary opponents may oppose him in the general election by the simple process of being nominated by only 2 per cent of the electors.

A comparison, we submit, of the Missouri Primary Law with that of the Louisiana Primary Law and the West Virgina Primary Law, as considered in the *Classic case* and the *Gradwell case, supra,* in light of the true meaning of the phrase "integral part," will lead to the conclusion that a party primary in Missouri is not a *necessary* part of the subsequent election.

(3) The application of Section 19 of the Criminal Code (18 U. S. C. A. 51) to state party primaries by implication contravenes petitioners' rights under the Fifth Amendment to the Constitution of the United States.

A construction of said section 19 of the said Criminal Code so as to render said section applicable to the facts charged in said indictment, will, if made, constitute a violation, contravention and inhibition of Amendment V of the Constitution of the United States, which provides that no

person shall be deprived of life, liberty or property without due process of law; said contravention, violation and inhibition consists in this, to-wit: said section, when read and considered by the ordinary person in conjunction with Sections 2 and 4 of Article I and Amendment XVII of the Constitution of the United States, is so vague, indefinite and uncertain that such person would not thereby be caused to know and be informed that the facts alleged in said indictment constituted an offense against and a violation of the laws of the United States, by reason of which a conviction, sentence and the execution thereof, based on the within indictment would be and constitute an inhibition, contravention and violation of said due process of law provision of said constitution.

U. S. v. *Classic*, 313 U. S. 299 (Dissenting opinion). We believe the facts here take this case without the majority opinion in the Classic case and bring it within the reasoning of the dissenting opinion. Should this Court disagree with us in that we earnestly urge that the Classic case be reviewed to see if the dissenting opinion does not contain the sounder reasoning and should now be adopted as the opinion of this Court.

(4) The court erred in admitting in evidence Government Exhibits 1, 2, 6 and 7 and thereby deprived petitioners of their right to confront and cross examine the witnesses in violation of the Sixth Amendment to the Constitution of the United States.

The voting record stamped on the backs of Exhibits 1 and 2 is "supposed" to be stamped by the election judges at the time the vote is cast (R. 98). Sec. 12118, R. S. Mo., 1939, provides for the form of the registration affidavit and for the voting record on the back thereof. Above the form of the voting record, the statute provides shall be

written the words "Stamp or write the date of each election at which the voter votes on the first vacant space." This clearly refers to the registered voter. Sec. 12138, R. S. Mo., 1939, provides that the qualified elector on the day of election shall be entitled to receive a ballot and reads: "It shall be the duty of such judges of election to deliver such ballot to the elector." The statute further provides for the numbering and initialing of the ballots. Sec. 12139, R. S. Mo., 1939, provides for the receiving of the vote from the elector after he has marked his ballot and the placing of the same in the ballot box. The statute expressly provides that "the judge having charge of the precinct register shall then, in a space prepared thereon, write or stamp the word 'voted' and the date of the election as in this article provided." Clearly, this stamp evidences one thing only, *i. e.*, that the judges of election decided or adjudged that the registrant had cast his vote. The precint election officials in Missouri act in a judicial or quasi-judicial capacity.

State ex rel. Wahl v. *Speer*, 284 Mo. 45, 223 S. W 655.

Pike v. *Megoun*, 44 Mo. 491.

McGowan v. *Gardner*, 186 Mo. App. 484, 172 S W. 408.

The findings or judgments of such officials may not be collaterally attacked.

State ex rel. City of Marshall v. *Hackman*, 274 Mo. 551, 203 S. W. 960, 963-964.

Long et al. v. *Consolidated School Dist.*, 331 Mo 302, 53 S. W. 2d 867.

Such findings and judgments may not be contradicted by parol.

Langford v. *Gebhardt*, 130 Mo. 621, 32 S. W. 1127, 1130, 1132.

In the Langford case, an election contest case, it was ruled not permissible to show that a record recording a vote as having been cast by Frank Vance was, in truth and in fact, cast by Frank Lentz.

Such findings or judgments of a Missouri election board, we submit, are not as solemn and reliable as a judgment of the United States Court. Where, as here, the element of the offense charged, that is sought to be proved by such findings or judgment, can be established by parol evidence, it is a violation of the defendant's right of confrontation to receive the same in evidence.

Kirby v. *U. S.*, 174 U. S. 47.
U. S. v. *Elder*, 232 Fed. 267.
Dowdell v. *U. S.*, 221 U. S. 325.

In the case of *Kirby* v. *U. S.*, *supra*, l. c. 55, the court said:

> "But a fact which can be primarily established only by witnesses cannot be proved against an accused —charged with a different offence for which he may be convicted without reference to the principal offender—except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases."

In the case of *Dowdell* v. *U. S.*, *supra*, l. c. 330, the court said:

> "This provision * * * intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination. It was

intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination. *Mattox* v. *U. S.*, 156 U. S. 237, 242; *Kirby* v. *U. S.*, 174 U. S. 47, 55; Wigmore on Evidence, Volume 2, Sections 1396, 1397."

In the case of *Third National Bank & Trust Co.* v. *U. S.*, 53 F. 2d 599, the action was on a War Risk Insurance policy. The issue was whether the veteran was totally and permanently disabled. The finding of the Veterans' Bureau that such veteran was not totally and permanently disabled, although one that the law required to be made and recorded, was not admissible or of any probative force.

If said voting records are admissible, which we deny, they are evidence only of what they purport to show, *i. e.*, that the registrant cast a vote on the date indicated. In the case at bar they were used as evidence that an imposter cast a vote in the name of the registered voter (R. 253). Where, in this case, a registrant testified that he did not vote and the government introduced the voting record of said registrant, the evidence was merely contradictory, the one of the other. The record is evidence only of what it purports to show and what the law requires to be recorded.

Third National Bank & Trust Co. v. *U. S.*, 53 F. 2d 599.

As to Exhibit 6, the purported copy of the poll book and Exhibit 7, the sheets upon which some purported line numbers are written.

If the original poll books had been produced, their use as evidence that a vote had been cast by an imposter, in the place and stead of a registrant would have involved all the objectionable features pointed out, *supra*, Point I,

as to the use of the stamped voting records (Exs. 1 and 2) for that purpose.

(5) The court erred in refusing to direct verdicts of acquittal for defendants Klein and Burke.

(A) The flaws in the government's case are plain:

Directed verdicts of acquittal for defendant election judges, Wilson and Melham, exonerated the election officials from any criminal liability. This left Petitioners, defendant Holmes and alleged "persons unknown" as the only possible conspirators. Holmes was given a new trial. There was no proof of any unknown persons participating —such conclusion could only be drawn by inference from the results and speculation. The two alleged conspirators Klein and Burke were unfriendly to each other (R. 376, 392). Burke had lost his job as captain of this precinct to Klein and was resentful of Klein (R. 376). Burke took no orders from Klein or anyone else; he worked with Klein not for Klein (R. 392, 393, 383). Burke worked independently in getting voters in and there is no evidence of any criminal cooperation between them (R. 383, 393). We believe it is incredible these two men would cooperate and work together in this alleged criminal conspiracy under the circumstances here.

There was no evidence Burke was working for any particular candidate or slate of candidates on the democratic ticket. As to Klein, the undisputed evidence was he did not tell the workers what candidates he was supporting; he told them only to get out the vote (R. 344). In holding such evidence made a submissible case, the Court of Appeals brought its opinion into conflict with the decision of the Second Circuit in the case of *United States* v. *Dire*, (2 Cir.) 159 F. 2d 818, 819, holding: "the prosecution must prove the accused to have associated himself

with the principals in the sense that he has a stake in the success of the venture."

We believe the decision of the Court of Appeals in this case is also and for the same reason in conflict with the decision of this Court in the case of *Direct Sales Co.* v. *United States*, 319 U. S. 703, 713, 63 S. Ct. 1265, 1270.

The Government did not produce as a witness a single person who admitted having impersonated a voter and casting a ballot in this precinct at this primary. The Goverment did not produce a single witness who testified he saw an impersonator cast a ballot in this precinct at this primary. The only evidence of any ghost voters being seen by anyone was once only, when a car of ghost voters came from some other precinct and offered to vote but the offer was refused and they left without voting (R. 448, 451).

There were many persons other than Petitioners who worked in this primary and were in a position to know who was going to vote and who was not going to vote and who could have been responsible for illegal votes being cast. The congressional candidates, Walsh, Axtell, Slaughter and Reeves, all had as many workers throughout the district as they could get (R. 141). The National Association for the Advancement of the Colored Race took an active part in this election (R. 141). Both the C.I.O. and A. F. of L. labor unions took an active part in this primary (R. 140). With no direct evidence against defendants, Klein and Burke, we submit the evidence merely raised a suspicion or gave room for conjecture that the illegal votes were cast at the instigation of these defendants. Evidence of that character is insufficient. *Crain* v. *United States*, (5 Cir.) 148 F. 2d 615, 617; *United States* v. *Silva*, (2 Cir.) 131 F. 2d 247, 249; *Kassin* v. *United States*, (5 Cir.)

87 F. 2d 183, 184; *Dennert* v. *United States,* (6 Cir.) 147 F. 2d 286 (2, 3).

The case against Burke rested on alleged oral admissions made by him to Special Agents Parish and Roberts, to the effect that he took one Rast to the polls to vote and they were told a ballot had already been cast in Rast's name, and also to the effect that he, with one Kennan, called on a Mr. and Mrs. Johnson about 6:30 and learned they were not going to vote (Votes were later cast in their names). The Government put Rast on the stand and he denied knowing Burke, denied going to the polls with Burke and denied being told his name was already voted (R. 425, 426). The Johnsons failed to identify Burke as one of the men who came to see them the evening of the primary (R. 285, 286). The special agents testified when Burke was told votes were cast in the names of the Johnsons just before the polls closed, he stated he did not know anything about that (R. 384, 385). Having introduced such exculpatory statements, we believe the burden was on the Government to prove such exculpatory statements to be false beyond a reasonable doubt. *Young* v. *United States,* (5 Cir.) 97 F. 2d 200, 202. The Government made no attempt to discharge that burden.

The conviction of these Petitioners necessarily rests on circumstantial evidence. In holding such evidence sufficient to justify submission to the jury, we believe the Court of Appeals has rendered a decision in conflict with the decisions of other Courts of Appeals, holding that where evidence is susceptible of two inferences, one of which is in favor of innocence, such evidence is robbed of all probative value, even though from the other inference guilt may be fairly deducible. *Leslie* v. *United States,* (10 Cir.) 43 F. 2d 288, 289-290, and cases there cited.

We believe it is also, and for the same reason, in conflict with the decisions of this Court in the cases of *Gunning* v. *Cooley*, 281 U. S. 90, 94, 50 S. Ct. 231, and *Stevens* v. *The White City*, 285 U. S. 195, 204, 52 S. Ct. 347, holding evidence which is consistent with two conflicting hypotheses tends to prove neither.

We believe it is also in conflict with *United States* v. *Potash*, (2 Cir.) 118 F. 2d 54, 57, and *United States* v. *Falcone*, 311 U. S. 205, 207-208, 61 S. Ct. 204, 205, holding knowledge of a conspiracy, full sympathy with and approval of its object, does not of itself make one liable as a conspirator.

We respectfully submit the evidence here does not "exclude every other reasonable hypothesis than the guilt of the defendant of the precise conspiracy charged." *Brooks* v. *United States*, (5 Cir.) 164 F. 2d 142, 143.

(B) In holding the fact one was a registered voter constituted prima facie proof that he was a qualified voter, the court decided a question of local law in a way probably in conflict with local decisions.

Article I, Section 2, and Amendment XVII of the Constitution of the United States, provide that electors of members of the House of Representatives and of United States Senators "shall have the qualifications requisite for elector of the most numerous branch of the State Legislature."

Article VIII, Section 2, Missouri Constitution, 1945, requires a voter to be a citizen of the United States, over the age of twenty-one, a resident of the state one year, and in the county, city or town sixty days next preceding the election.

Sec. 11563, R. S. Mo., 1939, provides that no party shall be entitled to vote at a primary unless a qualified elector

of the precinct and duly registered therein, and known to affiliate with the political party named at the head of the ticket he calls for or obligates himself to support the nominees of said party at the following general election.

In attempting to prove qualified voters were prevented from voting, the Government relied upon the fact such persons were registered voters as sufficient to prove they were qualified voters. The Court of Appeals affirmed that ruling, saying "there was no evidence that those who were prevented from voting were not qualified voters" (R. 647).

The effect of the Missouri election laws is controlled by the statutes and court decisions of Missouri. *E. I. Du Pont de Nemours & Co.* v. *Frechette,* (8 Cir.) 161 F. 2d 318, 322; *Akins* v. *State of Texas,* 325 U. S. 398, 399, 65 S. Ct. 1276, 1277, footnote 1.

Under the laws of Missouri, the mere fact one is a registered voter is insufficient to carry to the jury the issue in a criminal case as to his being a qualified voter. *State* v. *O'Brien,* 168 Mo. 404, 68 S. W. 341, and *State* v. *Nolan,* 168 Mo. 446, 68 S. W. 346.

The trial Court and the Court of Appeals decided this question in a way in conflict with local law. This was a vital error.

CONCLUSION.

Petitioners have been deprived of their Constitutional and legal rights.

The decisions of the trial Court and of the Court of Appeals, we submit, have the effect of extending Federal jurisdiction to all State primaries at which a party nominee for Congress is to be chosen, and are clearly in conflict

with *United States* v. *Gradwell*, 243 U. S. 476, in holding the Missouri Party Primary was an integral part of the general election following; the introduction of Government Exhibits 1, 2, 6 and 7 deprived Petitioners of their right of confrontation and cross examination of the witnesses against them in violation of Amendments V and VI of the Constitution of the United States; the ruling the fact of registration *prima facie* established such registrant as a qualified voter decided an important question of local law in conflict with applicable local decisions; and in holding a case was made for submission to the jury, we respectfully submit the trial Court and Court of Appeals rendered a decision in conflict with decisions of other Courts of Appeal and this Court on the same matter.

Unless the supervisory power of this Court is exercised, Petitioners will be deprived of their constitutional and basic rights.

Wherefore, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Constitution of United States.

ARTICLE I.

"Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature. * * *"

"Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

AMENDMENT (V).

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT (VI).

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury

of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

AMENDMENT (XVII).

"The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution."

"*Section 51.* (*Criminal Code, section 19.*) *Conspiracy to injure persons in exercise of civil rights.* If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoy-

ment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States. (R. S., Sec. 5508; Mar. 4, 1909, c. 321, Sec. 19, 35 Stat. 1092.)"

Missouri Revised Statutes, 1939.

"Sec. 4355. Fraudulent voting

Every person who shall, at any election held in pursuance of the laws of this state, or of any city or other municipality thereof, vote more than once, either at the same or a different place, or shall knowingly cast more than one ballot, or shall vote at any such election knowing that he is not a qualified voter and is not entitled to vote, and every person who shall knowingly advise or procure any person to vote who is not entitled to vote, or shall knowingly advise or procure any illegal vote to be cast at any such election, shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by a fine of not less than fifty dollars, or by both such fine and imprisonment. R. S., 1929, Sec. 3961."

"Sec. 11538. Certificates of nominations, when to be filed—vacancy in nomination—false or corrupt use of telegraph in connection with vacancy and substitution of name

Certificates of nominations filed with the secretary of state shall be filed not more than ninety and not less than seventy days before the day fixed by law for the election of the person in nomination. Certificates of nomination herein directed to be filed with the clerk of the county

court of each county shall be filed not more than ninety days and not less than seventy days before election: Provided, that in case of any vacancy in said nomination, by resignation or death and not otherwise, the central committee, or a convention called for that purpose, of the party on whose ticket such vacancy may occur, may select and certify to the secretary of state, county clerk or board of election commissioners the name or names of candidates to fill such vacancy; Provided, that the certificates of nomination to fill vacancy shall be filed with the secretary of state not later than fifteen days before the day fixed by law for the election of the persons in nomination, and with the board of election commissioners or county clerk not later than ten days before such election: Provided Further, that in case of a vacancy, caused by death, resignation or physical casualty and not otherwise at a later date than those just herein provided, the chairman of the party committee of the county, district or state, as the case may be, is hereby empowered to fill the vacancy by the appointment of another person to be the candidate for that office, and he shall make an affidavit covering all the facts before the judge of some court of record who shall, under his hand and the seal of the court, grant a certificate covering the facts, which said certificate shall be filed with the secretary of state, county clerk or board of election commissioners. If with the secretary of state, he shall immediately notify the various county clerks and boards of election commissioners of the vacancy, and whenever the county clerks or boards of election commissioners are duly notified of a vacancy as defined in this proviso, it shall be their duty forthwith to have printed small pasters, suitable for covering the name or names to be stricken out, said pasters containing in plain letters the name or names to be substituted; and the said county clerks or boards of election commissioners

shall see to it that these pasters are properly applied to the tickets before they are placed in the hands of the voters, if necessary, by having them conveyed to the judges of election, with instructions to paste them over the name or names to be stricken out before the tickets are delivered to the voter. Should the county clerks or boards of election commissioners receive the notification herein provided for in time to do so, they shall have the proper correction made on the ticket while it is still in the hands of the printer. Should the exigency of time be so great as to require it, notice of the vacancy and of the compliance with this provision by the chairman of the political party may be conveyed to the secretary of state, county clerk or board of election commissioners by telegraphic message, to be followed by the filing of the papers; said officers shall proceed immediately upon receipt of such telegram to take action as though the papers were already filed, and county clerks and boards of election commissioners shall in a similar manner act upon a telegraphic notice from the secretary of state. Any false or corrupt use of the telegraph to mislead any officer in regard to a vacancy and substitution of a name upon a ticket to be voted for at the polls in this state shall be deemed a felony, to be punished by imprisonment in the penitentiary for a term not exceeding ten years. Added, Laws, 1944, Ex. Sess., p. 22, Sec. 1."

"Sec. 11546. Nominations, how made—exceptions

Hereafter all candidates for elective offices shall be nominated by a primary election held in accordance with this article. This article shall not apply to special elections to fill vacancies, nor to county superintendents of schools, to city officers not elected at a general state election, to town, village or school district officers. R. S. 1929, Sec. 10253."

"Sec. 11563. Who entitled to vote

No person shall be entitled to vote at any primary unless a qualified elector of the precinct and duly registered therein, if registration thereat be required by law, and known to affiliate with the political party named at the head of the ticket he calls for, and attempts to vote, or obligates himself to support the nominees of said party at the following general election. R. S., 1929, Sec. 10269."

"Sec. 11569. Whose name shall appear on official ballot as nominee

The person receiving the greatest number of votes at a primary as the candidate of a party for an office shall be the candidate of that party for such office, and his name as such candidate shall be placed on the official ballot at the following election. R. S. 1929, Sec. 10275."

"Sec. 11584. Penalties and provisions of election laws to apply

The provisions of the statutes now in force in relation to the holding of elections, the solicitation of voters at the polls, the challenging of voters, the manner of conducting elections, of counting the ballots and making return thereof, and all other kindred subjects, shall apply to all primaries in so far as they are consistent with this article, the intent of this article being to place primary elections under the regulation and protection of the laws now in force as to general elections. Any act declared an offense by the general laws of this state, concerning caucuses and elections, shall, also, in like case, be an offense in all primaries, and shall be punished in the same form and manner as therein provided, and all the penalties and provisions of the law as to such caucuses and elections, ex-

cept as herein otherwise provided, shall apply in such cases with equal force and to the same extent as though fully set forth in this article. R. S. 1929, Sec. 10289."

"*Sec. 12118. Form of affidavits of registration*

The form of the affidavit of registration shall be substantially as follows:

	RESIDENCE				
	Street.	No.	Floor, Apt. or room.	Ward.	Precinct.
Last name First name Second name					
Date of start of residence & present address					
Male Female					
White Colored					
Birthplace					
Date of birth: Day Month Year					
If naturalized: Name of Court Place Date					
Through whom naturalized: Husband Father Name					
Remarks					

AFFIDAVIT OF REGISTRATION.

State of Missouri County of ..... *ss.*

I hereby swear (or affirm) that I am a citizen of the United States, that on the day of the next succeeding election I shall be at least twenty-one years of age, and shall have resided in the State of Missouri one year and in the city sixty days immediately preceding the election, and that I am legally qualified to vote.

Subscribed and sworn to before me this ..... day of .....

.....

Signature of voter.

.....

Signature of registration officer.

VOTING RECORD.

Stamp or write the date of each election at which the voter votes on the first vacant space.

The wording of the affidavits of registration, and the applications for registration hereinafter provided for, for registrations made between the close of a registration for an election and the day of the said election, shall be changed by striking through the words, "the day of the next succeeding election" and inserting the date of the election for

which the registration applies, and such registration affidavits shall not be filed in the precinct registers until following the date of the next succeeding election. The arrangement of the affidavit form may be changed, including printing of the voting record on the back, as may be deemed necessary by the board. The board may cause to be printed or written upon the margins of the affidavit form, in addition to the matter contained in the above form, all such words as are deemed necessary or convenient in the assorting, classification or handling of such affidavits with correctness and dispatch. The affidavit forms shall be printed on good quality stock, and of such size as the board may determine. The affidavits shall be of such size and design that entries may be written by hand or be typewritten and the words "affidavit of registration" shall be in bold face type of larger size than any other used on the form. Laws, 1937, p. 294, Sec. 24."

"Sec. 12138. Voters to receive ballots after identification—certificates—marking ballots

Any qualified elector, on the day of election, in any precinct, shall be entitled to receive from the judges of election a ballot to be voted for at said election, after such elector is identified as in this section provided. After such identification, it shall be the duty of such judges to deliver such ballot to the elector. Such elector shall identify himself to such judges and sign his name and address either in whole or by mark upon a voter's identification certificate furnished him by the clerk of the same politics to the judge of election in charge of the ballot box. Such certificates shall be furnished to the judges and clerks of election in each precinct by the Board of Election Commissioners, and shall be in substantially the following form:

VOTERS IDENTIFICATION CERTIFICATE

Pct. . . . . No. . . . . .
Ward . . . . . .

GENERAL ELECTION NOVEMBER 1946

I hereby certify that I am qualified to vote at this election.

. . . . . .
Sign Name (Do Not Print)
. . . . . .
Address

. . . . . .
. . . . . .
(Judges initials)

In each precinct such certificates shall be serially numbered beginning with number one (1) as hereinafter and in Section 12137 provided. The elector's signature and address on such certificate shall be compared by the judges in charge of the precinct registers with the elector's signature and address on such registers. Any question of doubt concerning the identity of the elector shall be decided by a majority of the judges. Upon identification, the judges in charge of the precinct registers shall initial said certificate and return it to the elector. Before delivering any ballots to the electors, the two judges of opposite politics having charge of the ballots shall write their names or initials upon the back of the ballots, with ink or indelible pencil, writing the name or initials in the same order on every ballot and no other writing shall be on the back of the ballot except the number of the ballot voted. Upon receipt of his ballot, the voter shall forthwith, and without leaving the enclosed space, retire alone to one of the voting booths so provided, and shall mark his vote on the ballot according to the instructions. The voter shall then fold his ballot in such manner as to leave the judges'

initials thereon exposed but not to disclose for whom or how the voter has voted, except voters entitled to and receiving assistance in voting as herein provided. After marking and folding his ballot, the voter will hand the ballot and his identification certificate to the judge of election in charge of the ballot box. Reenacted Laws, 1947, Vol. 2, p. ——, H. B. No. 390, Sec. 1."

"Sec. 12139. Duties of judges

The judge of said election of opposite politics from the judge who hands the ballot to the voter shall receive the ballot and voter's identification certificate from the voter, and shall announce the name of such voter in a loud voice. Said judge shall then deliver such voter's identification certificate to the clerk of opposite politics to said judge, which clerk shall thereupon write on the face of said certificate the number of the same, which number shall be the next number in order after the number of the last certificate so received by said clerk. Said number when announced by said clerk shall also be placed by the said ballot box judge on the back of the voter's ballot, and the said judge shall thereupon put said vote into the ballot box, in the presence of the voter and the judges and clerks of said election, and in plain view of the public. Upon putting said vote into the ballot box, the judge having charge of the precinct register shall then, in a space prepared thereon, write or stamp the word 'voted' and the date of the election as in this article provided. If such person so registered shall be challenged or disqualified, the party challenging shall assign his reason therefor, and thereupon one of said judges shall administer to him an oath to answer questions; and if he shall take said oath, he shall then be questioned by said judge or judges touching such cause of challenge, and touching any other cause of disqualification. And he may also be questioned by

the person challenging him in regard to his qualifications and identity. But if a majority of the judges are of the opinion that he is the person so registered and a qualified voter, his vote shall then be received accordingly. But if his vote be not received by a majority of such judges, such person may afterward produce and deliver an affidavit to such judges, subscribed and sworn by him before one of said judges, in which it shall be stated how long he has resided in such precinct, county or city and state, that he is a citizen of the United States, and is a duly qualified voter in such precinct and that he is the identical person so registered; also supported by an affidavit of a registered voter who is a householder residing in such precinct, stating his own residence, and that he knows such person, and that he does reside at the place mentioned and has resided in such precinct, county and state for the length of time as stated by such person, which shall be subscribed and sworn to in the same way; whereupon the vote of such person shall be received and entered as other votes. But such clerks and judges having charge of such registers shall state in their respective reports, in writing, the facts in such case, and the affidavits so delivered to said judges shall be preserved and returned to the office of the commissioners of election. Blank affidavits of the character aforesaid shall be sent out to the judges of all precincts, and the judges of election shall furnish the same on demand, and administer the oath without charge. Such oaths may be administered by any officer authorized by law to administer oaths. Reenacted Laws, 1947, Vol. 2, p. ——, H. B. No. 390, Sec. L."

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In the Supreme Court of the United States

OCTOBER TERM, 1949

Nos. 329, 330

MORRIS KLEIN AND HARRY BURKE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 638-649) is reported at 176 F. 2d 184. The opinion of the District Court (R. 13-23) overruling motions to dismiss the indictment and for a bill of particulars is not reported.

JURISDICTION

The judgments of the Court of Appeals were entered July 21, 1949 (R. 649-650), and a petition for rehearing (R. 651-660) was denied August 15, 1949 (R. 661). The petition for writs of certiorari

was filed September 12, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether, under Missouri law, a primary is such an integral part of the procedure of electing Representatives in Congress that the right of participation in such an election is protected by Article I, Section 2 of the Constitution.

2. Whether the evidence is sufficient to sustain petitioners' convictions.

3. Whether the trial court erred in admitting in evidence public records showing the names and voting records of registered voters and lists of voters copied from a poll book which had been stolen before trial.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Constitution, federal statutes, and Missouri statutes involved are set out in the Appendix, pp. 18-25, *infra*.

STATEMENT

Petitioners Klein and Burke, Democratic precinct captain and ward worker, respectively, in the 10th Precinct of the First Ward of Kansas City, Missouri, were indicted with three others [1] under Section 19 of the Criminal Code, 18 U.S.C. (1940

[1] The trial judge granted motions for judgment of acquittal as to the defendants Wilson and Melham (R. 33) and a motion for a new trial and in arrest of judgment as to the defendant Holmes (R. 51).

ed.) 51 (Appendix, *infra,* p. 18), for conspiracy to injure and oppress qualified voters of the 10th Precinct in the free exercise and enjoyment of their rights secured by the Constitution and laws of the United States to vote for candidates for the Democratic nominations for the offices of United States Senator and Representative in Congress at a primary election held on August 6, 1946, and to have their votes counted as cast, by preventing qualified voters from voting, permitting persons not qualified as voters to vote in the name and place of qualified voters, placing forged and fictitious ballots in the ballot box, and other means, thereby to effect a fraudulent count of the votes cast and impair, diminish, and dilute the effect of the choice of the voters (R. 1-6).

As we read the petition, petitioners do not dispute that the evidence showed the existence of a conspiracy as charged in the indictment, but only that there was sufficient evidence to show that they participated in it (see Pet. 24-27). We summarize here very briefly the undisputed facts tending to establish the conspiracy and discuss in the Argument, *infra,* pp. 11-13, the evidence of petitioners' activities.

At the primary held on August 6, 1946, there were three candidates—Axtel, Slaughter, and Walsh—for the Democratic nomination for Representative in Congress. The returns from the 10th Precinct showed 259 votes cast for Axtel, 19 for Slaughter, and 8 for Walsh (R. 154, 610).

Thirty-six persons who had qualified to vote testified that they did not vote in the election, but ballots were cast in their names by impersonators. Twenty-three qualified voters testified that they voted for Slaughter and four that they voted for Walsh. Six qualified voters were informed when they appeared at the polls that they had already voted when as a matter of fact they had not. After protesting to the Board of Election Commissioners, they were allowed to vote, and as to each of them both votes were counted. (R. 610-611.) The Government's evidence established that 43 voters were impersonated and 43 fraudulent ballots counted. It was also proved that practically all of the fraudulent votes were cast for Axtel. (See R. 648.)

Upon conviction (R. 36-37), petitioner Klein was sentenced to eighteen months' imprisonment and fined $25 (R. 52-53) and petitioner Burke was sentenced to imprisonment for one year and one day and fined $25 (R. 53-54). The convictions were affirmed by the Court of Appeals (R. 649-650).

ARGUMENT

1. Petitioners' principal contention (Pet. 11-19) is that the Missouri primary here involved was not an "integral part" of the general election procedure within the rule of *United States* v. *Classic*, 313 U.S. 299.

The *Classic* case held that the law of Louisiana made the primary election an integral part of the procedure of choosing Representatives in Con-

gress and that where such is the case, the rights of voters to cast their ballots in primaries and have them counted are secured by Article I, § 2 of the Constitution (Appendix, *infra*, p. 18), and that a conspiracy to injure and oppress citizens in the free exercise and enjoyment of such rights is punishable under §§ 19 and 20 of the Criminal Code. That decision, we submit, is controlling here.

Petitioners' attempt (Pet. 12-13) to distinguish the *Classic* case on the ground that the Louisiana primary was held to be an integral part of the general election machinery because of the fact that in that State the winning candidates in the primary invariably won in the general election, is negated by this Court's statement of the rule of that case (313 U.S. at 318):

> Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, § 2. And the right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which *invariably, sometimes or never* determines the ultimate choice of the representative. [Italics supplied.] [2]

[2] *United States* v. *Gradwell*, 243 U. S. 476, upon which petitioners strongly rely (Pet. 12, 13-14), does not help them.

It is clear from the Missouri statutes (see Appendix, pp. 19-25, *infra*), just as it was clear from the Louisiana statutes in the *Classic* case, that the primary is an integral part of the procedure for choosing Representatives in Congress.[3] Section 11546 of the Revised Statutes of Missouri, 1939, provides that "Hereafter all candidates for elective offices shall be nominated by a primary election held in accordance with this article." The statutes contain provisions for the time and place of primary elections (Sec. 11547), an official ballot for primaries (Sec. 11557), distribution of primary ballots (Sec. 11558), payment for such ballots and other supplies and expenses from the public treasury (Sec. 11559), qualifications of voters at primaries (Sec. 11563), publication of the results of primaries by the Secretary of State (Sec. 11570), certification of the nominees by the Secretary of State to county clerks (Sec. 11571), the

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So far as pertinent here, that case held only that the rights which candidates for nomination for Senator may have had in a West Virginia primary election were derived wholly from state law and that a conspiracy to injure and oppress them in the enjoyment of those rights by corrupting the election was not within the scope of Section 19 of the Criminal Code. The Court pointed out in the *Classic* case (313 U. S. at 317) that the *Gradwell* decision expressly reserved the question whether "a primary should be treated as an election within the meaning of the Constitution" (243 U.S. at 487; see also p. 488) and that the question had not been prejudged in *Newberry* v. *United States*, 256 U.S. 232. As we have pointed out in the text, the *Classic* case resolved that question, in so far as the rights of voters under Article I, § 2 are concerned. See also *Smith* v. *Allwright*, 321 U.S. 649, 659-660.

[3] The trial judge, after reviewing the Missouri statutes, held that this proposition was "not debatable" (R. 18-19) and the Court of Appeals agreed (R. 642-643).

appointment of election judges and clerks as in general elections (Sec. 11582), and the application to primaries of all provisions and penalties applicable to general elections, "the intent of this article being to place primary elections under the regulation and protection of the laws now in force as to general elections" (Sec. 11584). Compare the Louisiana statutes summarized in the *Classic* case, 313 U.S. at 311-312. Section 11569 provides:

> The person receiving the greatest number of votes at a primary as the candidate of a party for an office shall be the candidate of that party for such office, and his name as such candidate shall be placed on the official ballot at the following election.

And Section 11595, dealing with ballots, voting, and returns at general elections, provides:

> Every ballot printed under the provisions of this article shall contain the names of every candidate whose nomination for any office specified on the ballot has been certified or filed according to the provisions of this chapter, and no other names. * * *

The results of the primary thus determine the names of the persons who shall appear on the ballot at the general election as the candidates of the parties which participated in the primary. A certificate of nomination of a candidate selected otherwise than by a primary may be filed with the Secretary of State but must be signed by electors

resident within the district equal in number to two percent of the entire vote cast at the last preceding election. Secs. 11527, 11534, 11541. However, an unsuccessful candidate in a primary could not run as the nominee of his party (Secs. 11569 and 11595, *supra*), but would have to run as an independent. Thus, just as in Louisiana, Missouri by statute "eliminates or seriously restricts the candidacy at the general election of all those who are defeated at the primary." 313 U.S. at 311.

The similarity between the Missouri statutes and those of Louisiana is at once apparent. The fact that in Louisiana an unsuccessful candidate at a primary may not be a candidate at the general election (see 313 U.S. at 313), while in Missouri he may do so by certificate of nomination (see Pet. 12-13, 19), does not destroy the essentially analogous features of the Louisiana and Missouri statutes, nor does it negate the proposition that under Missouri law the primary is an "integral part"[4] of the election machinery.

There is no merit in petitioners' further contention (Pet. 12-15, 19) that the *Gradwell* decision (footnote 2, p. 5, *supra*) demonstrates that under Missouri law the primary is not a part of the election process because of the provisions, common to both West Virginia and Missouri, whereby

[4] Webster's New International Dictionary defines "integral," *inter alia*, as "composed of constituent parts making a whole." Under this definition, the Missouri primary system is certainly an "integral part" of the election machinery within the meaning of that phrase as used in the *Classic* decision. Cf. Pet. 15, 17.

an unsuccessful candidate at a primary may still become a candidate at the general election. In the first place, as we have pointed out above, the *Gradwell* case was concerned with the rights of candidates at primaries and the question whether a primary is an election within the meaning of Article I, § 2 of the Constitution was expressly reserved. Under the *Classic* case, decided 24 years later, the status of a primary as an election within the protection of the Constitution depends, *inter alia,* upon the pattern of state law regulating primaries and the effect of the choice of candidates for nomination upon the ultimate choice at the general election. As we have shown, under Missouri law primary and general elections are fused into a single procedure for the election of public officers. Finally, it should be noted that in *Smith* v. *Allwright,* 321 U.S. 649, it was held, upon the authority of the *Classic* decision, that a Texas primary was an election within the protection of the Constitution, notwithstanding provisions of Texas law whereby it was possible for an unsuccessful candidate for nomination at a primary election to be elected at the general election (see 321 U.S. at 656 footnote, 663).[5]

2. As we understand their argument, petitioners' attack (Pet. 24-28) upon the sufficiency of the evidence to support their convictions goes only

[5] Petitioners' contention (Pet. 19-20) that Section 19 of the Criminal Code as applied here is unconstitutional for indefiniteness is in the teeth of the holding to the contrary in the *Classic* case, 313 U.S. at 322-325, and they cite only the dissenting opinion in that case as supporting them.

to the evidence connecting them with the conspiracy, but not to the evidence showing that a conspiracy existed. In any event, it is clear from the evidence briefly summarized in the Statement, *supra,* pp. 2-4, that there existed a conspiracy to corrupt the election and that, as the Court of Appeals observed (R. 648), it "required the intervention of a human agency to bring about its unlawful purpose." In such circumstances, it is settled that only slight quantitative evidence connecting a defendant with a proved conspiracy may in the circumstances be substantial and, therefore, sufficient to warrant submission to the jury of the issue of his guilt. *Meyers* v. *United States,* 94 F. 2d 433, 434 (C.A. 6), certiorari denied, 304 U. S. 583; *Luteran* v. *United States,* 93 F. 2d 395, 398 (C.A. 8), certiorari denied, 303 U. S. 644; *Marx* v. *United States,* 86 F. 2d 245, 250 (C.A. 8); *Galatas* v. *United States,* 80 F. 2d 15, 24 (C.A. 8), certiorari denied, 297 U. S. 711. Nor is it necessary that there be participation by each conspirator in every detail of its execution. *Ryan* v. *United States,* 99 F. 2d 864, 869 (C.A. 8), certiorari denied, 306 U. S. 635. The jury having found petitioners guilty, that view of the evidence and the inferences reasonably deducible therefrom which are most favorable to the Government must be accepted. E.g., *Glasser* v. *United States,* 315 U. S. 60, 80; *Walker* v. *United States,* 93 F. 2d 383, 392 (C.A. 8), certiorari denied, 303 U. S. 644; *Shannabarger* v. *United States,* 99 F. 2d 957, 961 (C.A. 8).

Although as to both petitioners the evidence was much more than slight, it was especially strong against Klein. As precinct captain he had the duty of getting out the vote on election day (R. 326). In his position he could learn what voters were not expected to vote so that they could safely be impersonated. One Passantino testified that either he or petitioner Burke got a list of the registered voters in the precinct and prepared a "You Have Not Voted" card (Gov. Ex. 13, Ex. Book III, p. 71) for each and delivered them to Klein (R. 317-318, 321). After a voter cast his ballot the card bearing his name was destroyed (R. 322). If, however, a registered person said he probably would not vote, his card was brought back to Klein, who could then get an impersonator for such qualified voter. The operation of the plan is illustrated by the testimony of the witnesses Rentie and Tatum. On the morning of election day Klein distributed some of these cards to them and agreed to pay them $10 each to contact the persons named thereon and urge them to vote and to return the cards bearing the names of those who were not going to vote (R. 324-326; see also R. 296-298, 299-301, 302-304). Rentie returned the card of one Pinkston (R. 327), who did not vote and was impersonated (R. 268-269). Tatum, who corroborated Rentie's testimony, turned in the cards of other persons who were not expected to vote, some of whose names she remembered (R. 340). Four of these latter persons testified they

did not vote (R. 253, 263, 288, 350), although they were shown to have been "voted" by the documentary evidence (Gov. Exs. 1 and 2 and Gov. Ex. 6, Ex. Book III, pp. 36, 38, 43, 29).

There was evidence that Klein had a registration list at the polls all day, checking off and calling out names of the persons presenting themselves as voters (R. 328, 339). On one occasion, Klein took a ballot away from a voter, Mrs. Bowles, just as she was about to drop it in the ballot box (R. 178, 182). Another voter, Bowles, was told when he appeared to cast his ballot that he had already voted when in fact he had not. When he returned later with election officials to demand a ballot, Klein told him and his brother that they "were Democrats anyway, and that it didn't make much difference" and that they should "forget about it" (R. 184-185).

Estella Carter testified that when she came to the polls to vote, Klein said he had already "voted" her because Mrs. Rentie had told him that she would not vote; that she complained to Klein that she had been deprived of her right to vote; that he told her to wait a minute, but in the meantime the polls closed and she did not get a chance to vote; and that Klein then offered to give her some money and make it "all right" with her but she refused to accept it (R. 349-350).

There was also clear evidence that Burke participated in the conspiracy. He was working in "cooperation" with Klein, the precinct captain (R.

362), and his duties were to give any assistance he could (R. 383). He took voters to the polls, and learned whether or not registered voters were going to vote (R. 364).[6] He had been a worker in the 10th Precinct for 20 years (R. 363). He paid 15 or 20 voters a total of about $25, allegedly out of his own pocket, just to show his friendship for their having voted (R. 362, 366, 386, 387). Burke was also quoted as having stated that when he took a voter named Rast to the polls late in the afternoon, they were told that Rast had already been voted, and that he became a little perturbed with Klein because of the incident (R. 378-379). Burke also admitted that about 6:30 p.m. on election day he and one Keegan called upon Luther and Marguerita Johnson, who told them they were not going to the polls (R. 383-385). The Johnsons themselves did not vote, but their names were "voted" (R. 266).

Both courts below having found the evidence sufficient to support petitioners' convictions, we submit that there is no occasion for further review of the evidence by this Court. See *Kann* v. *United States*, 323 U. S. 88, 93; *United States* v. *Johnson*, 319 U. S. 503, 518; *Delaney* v. *United States*, 263 U. S. 586, 589-590.[7]

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[6] Petitioners' argument (Pet. 24) that it is incredible that they would cooperate with each other because Burke resented the loss of his job as precinct captain to Klein, is contradicted by the above statements of Burke to two F.B.I. agents.

[7] There is no merit in petitioners' contention (Pet. 27-28), citing *State* v. *O'Brien*, 168 Mo. 404, and *State* v. *Nolan*, 168 Mo. 446, that there was error, because in attempting to prove

3. Finally, petitioners contend that the trial court deprived them of the right to confront and cross examine witnesses, in violation of the Sixth Amendment, when it admitted in evidence Government Exhibits 1, 2, 6 and 7 (Pet. 20-24). There is no substance in this argument.

Exhibits 1 and 2 were the original and duplicate loose-leaf binders of registration affidavits of voters in the 10th Precinct. The backs of the affidavits contained the voting records of the individual voters. Paragraph 26 of "Instructions to Judges and Clerks," issued by the Board of Election Commissioners for the August 6, 1946, primary (Ex. Book III, p. 67) reads:

> After the voter has polled his or her vote, the two judges having charge of the original and duplicate register, shall stamp in the first vacant space the date and the word "Voted."
> * * *
> It is the responsibility of the judges to see that the clerks promptly enter the voter's name and place of residence on the poll books.

---

that qualified voters were prevented from voting, the Government relied upon the fact that such persons were registered as sufficient to prove that they were qualified. The Missouri cases were concerned with convictions under a Missouri statute making it a felony to impersonate an elector, and the local decisions that in such a case proof of registration was not sufficient to prove the qualifications of the voter certainly do not control in a federal prosecution for conspiracy under Section 19 of the Criminal Code. There was proof that registered voters were impersonated at the polls. And, contrary to petitioners' further contention (Pet. 25), it was not necessary that the impersonators be produced as witnesses to establish that fact.

The Board is required by Missouri statute (R. S. Mo., 1939, Sec. 12151) to compare the voting records on the registration affidavits with the entries in the poll books made contemporaneously with the voting for the purpose of correcting any errors in the voting records. The stamping of the registration affidavits at the precinct by the election officials to indicate the voting record is also prescribed by statute (Sec. 12139), as well as by the regulation quoted above, and the same is true of the keeping of a poll book (Sec. 12137).

Exhibits 1 and 2 were public records, and the voting records entered therein were made contemporaneously with the event and in the regular course of business as prescribed by Missouri law. They were admissible under 28 U.S.C. (1940 ed.) 695 (Appendix, *infra,* pp. 18-19), which provides that "any writing or record * * * made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business * * *." Public records, regularly kept, are admissible under this statute,[8] the constitutionality of which has been sustained as against the claim it violated the Sixth Amendment.[9] The purpose of the statute was "to make admissible any writing if made in the regular course of any

[8] *Hunter* v. *Derby Foods,* 110 F. 2d 970, 972 (C.A. 2); *Pollack* v. *Metropolitan Life Ins. Co.,* 138 F. 2d 123, 127-128 (C.A. 3).

[9] *United States* v. *Leathers,* 135 F. 2d 507, 511 (C.A. 2).

business without the strict proof of authenticity which had theretofore been required." [10]

The best evidence as to who voted in the August, 1946, primary was, of course, the testimony of the voters themselves. The Government did produce at least 36 registered voters who testified that they did not vote. In order to prove fraudulent voting, the Government had a right to produce these public records to show that these voters were recorded as having voted, i.e., to show that their names were voted by impersonators.

Before the trial, both the ballots cast at the primary and the poll book containing the names and addresses of the persons recorded as having voted had been stolen (R. 66-67). Exhibit 6 was a list, copied by the witness Wilson early in September 1946, about a month after the election and before the theft, of the "names and addresses of all persons listed in the poll book as having voted" (R. 114). Exhibit 7 was a list of registered voters which had been checked by the witness Graves in November 1946 against the poll book and on which he had placed opposite the names the numbers of the lines in the poll book on which the named voters were recorded as having voted (R. 125-128).

Here again, the purpose of introducing these exhibits was to show which registered voters had been recorded as having voted in the primary and they were cumulative of the voting records shown by Exhibits 1 and 2. Since the poll book, if avail-

[10] *Harper* v. *United States*, 143 F. 2d 795, 806 (C.A. 8).

able, would have been admissible under 28 U.S.C. (1940 ed.) 695, *supra*, we submit that these exhibits were admissible as secondary evidence.[11]

Petitioners were confronted with the witnesses who identified Exhibits 1, 2, 6 and 7 (R. 96, 113, 119, 124, 137) and they were subject to cross examination. Hence there was no violation of the Sixth Amendment. As the Court of Appeals observed, petitioners' objections to the exhibits go to their weight rather than to their admissibility (R. 644, 645).

CONCLUSION

No conflict is involved and the case presents no unsettled question meriting consideration by this Court. The petition for writs of certiorari should be denied.

Respectfully submitted.

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OCTOBER, 1949.

[11] *Hartzell* v. *United States*, 72 F. 2d 569, 577-578 (C.A. 8), certiorari denied, 293 U.S. 621; *McDonald* v. *United States*, 89 F. 2d 128, 136-137 (C.A. 8), certiorari denied, 301 U.S. 697.

APPENDIX

Article I of the Constitution provides:

> Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature. * * *
>
> Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

Section 19 of the Criminal Code, 18 U. S. C. (1940 Ed.) 51, provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, * * * they shall be fined not more than $5,000 and imprisoned not more than ten years * * *.

The Act of June 20, 1936, c. 640, § 1, 49 Stat. 1561 28 U. S. C. (1940 Ed.) 695 provides:

> In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum

or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term "business" shall include business, profession, occupation, and calling of every kind.

Revised Statutes of Missouri, 1939, as amended, provide:

Sec. 11459. On the first Tuesday after the first Monday in November, in the year 1880, and every two years thereafter, there shall be an election held in each township in this state, and in each ward of the city of St. Louis, for the election of a member of congress from each congressional district, of senators and representatives in those districts and judges of the county courts in those counties where the term of those elected has expired, and for sheriffs and coroners, and such other officers as may be required by law to be elected at such elections.

Sec. 11527. Certificates of nomination shall be filed with the secretary of state for the nomi-

nation of candidates for offices to be filled by the electors of the entire state, or any district or division of a greater extent than one county. For all other nominations to public offices, certificates of nomination shall be filed with the clerks of the county courts of the respective counties wherein the offices are to be filled by the electors.

Sec. 11534. The certificate of nomination of a candidate selected otherwise than by a primary shall be signed by electors resident within the district or political division for which the candidate is presented, to a number equal to two per cent of the entire vote cast at the last preceding election in the state, the county or other division or district for which the nomination is made: *Provided*, that said signers shall declare in said certificate that they are *bona fide* supporters of the candidate sought to be nominated and have not aided and will not aid in the nomination of any other candidate for the same office.

Sec. 11541. Not less than twenty days before an election to fill any public office, the secretary of state shall certify to the clerk of the county court of each county within which any of the electors may by law vote for candidates for such office, the names and the description of each person nominated for such office, as specified in the certificates of nomination filed with the secretary of state.

Sec. 11546. Hereafter all candidates for elective offices shall be nominated by a pri-

mary election held in accordance with this article. This article shall not apply to special elections to fill vacancies, nor to county superintendents of schools, to city officers not elected at a general state election, to town, village or school district officers.

Sec. 11547. The primary shall be held at the regular polling places in each precinct on the first Tuesday of August, 1910, and biennially thereafter, for the nomination of all candidates to be voted for at the next November election.

Sec. 11557. An official ballot shall be printed and provided for use at each voting precinct in the form provided herein. The names of all the candidates for the respective offices, who shall have filed declaration papers as in this article prescribed, shall be printed thereon.

Sec. 11558. At least forty days before the August primary in any year, when a primary election is held, each county clerk shall prepare sample official ballots, placing thereon alphabetically, under the appropriate title of each office and party designation, the names of all candidates to be voted for in the precincts of his county. Such sample ballot shall be printed upon tinted or colored paper, and shall contain no blank endorsement or certificate. Such clerk shall forthwith submit such ticket of each party to the county chairman thereof, and mail a copy to each candidate to his post office address, as given in his declaration paper, and he shall post a copy of each sample ballot in a conspicuous place in his

office. On or before the tenth day before the holding of any primary election the county clerk shall correct any errors or omissions in the ballots, cause the same to be printed and distributed, as required by law in the case of ballots for the general election, except that the number of ballots to be furnished to each precinct shall be one and a half times the number of votes cast by any party in the last preceding election and having nominees and tickets at such primary election. [Added by Laws 1944, Ex. Sess., p. 24, § 1.]

Sec. 11559. All ballots, blanks and other supplies to be used at any primary, and all expenses necessarily incurred in the preparation for or in conducting such primary, shall be paid out of the treasury of the city, county or state, as the case may be, in the same manner, with like effect, and by the same officers as in the case of elections.

Sec. 11563. No person shall be entitled to vote at any primary unless a qualified elector of the precinct and duly registered therein, if registration thereat be required by law, and known to affiliate with the political party named at the head of the ticket he calls for, and attempts to vote, or obligates himself to support the nominees of said party at the following general election.

Sec. 11569. The person receiving the greatest number of votes at a primary as the candidate of a party for an office shall be the candidate of that party for such office, and his name

as such candidate shall be placed on the official ballot at the following election.

Sec. 11570. As soon as the state canvass of a primary shall be certified to him, the secretary of state shall cause to be published a certified statement of the result of such primary as to candidates for state officers, and representatives in congress, and any other candidate whose district extends beyond the limits of a single county, and shall mail to the chairman of the state central committee of each party so much of such certificate as relates to his party.

Sec. 11571. Not less than sixty-nine days before any November election, the secretary of state shall certify to the county clerk of each county within which any of the electors may vote for the candidates for such offices, the name and description of each person nominated for any such office as specified in the nomination papers. [Added by Laws 1944, Ex. Sess., p. 24, § 1.]

Sec. 11582. The judges and clerks for primary elections held under this article shall be appointed in the same manner, and possess the same qualifications and consist of the same number as judges and clerks of general elections in this state: *Provided,* that in all counties in this state which now contain, or hereafter may contain, a city of not less than one hundred thousand inhabitants and more than four hundred thousand inhabitants, the county committee of each political party which, at the gen-

eral election held next preceding any primary election held under the provisions of this article, cast at least ten per cent of all the votes cast at such election in such county, shall appoint three judges and one clerk for such primary election for each election precinct in such county outside of such city, and in all such cities the judges and clerks of election regularly appointed and commissioned for regular elections shall act as judges and clerks of all primary elections held under the provisions of this article.

Sec. 11584. The provisions of the statutes now in force in relation to the holding of elections, the solicitation of voters at the polls, the challenging of voters, the manner of conducting elections, of counting the ballots and making return thereof, and all other kindred subjects, shall apply to all primaries in so far as they are consistent with this article, the intent of this article being to place primary elections under the regulation and protection of the laws now in force as to general elections. Any act declared an offense by the general laws of this state, concerning caucuses and elections, shall, also, in like case, be an offense in all primaries, and shall be punished in the same form and manner as therein provided, and all the penalties and provisions of the law as to such caucuses and elections, except as herein otherwise provided, shall apply in such cases with equal force and to the same extent as though fully set forth in this article.

Sec. 11595. Every ballot printed under the provisions of this article shall contain the

names of every candidate whose nomination for any office specified on the ballot has been certified or filed according to the provisions of this chapter, and no other names. * * *

Sec. 12137. Each of the clerks of election shall keep a poll book which contains a column marked "number", another headed "residence" and another headed "names of voters". The name and street and number of the residence of such elector voting shall be entered upon the poll book by the clerk, in regular succession, under the proper headings, and the number of each voter, in the order in which he voted, placed opposite the name in the column headed "number".

Sec. 12139. * * * The judge having charge of the precinct register shall then, in a space prepared thereon, write or stamp the word "voted" and the date of the election as in this article provided. * * *

Sec. 12151. It shall be the duty of the board, following each election as soon as convenient, to have the precinct register of each precinct compared with the roster of voters. In case the name of any voter appears on the roster of voters for the election and the fact of his voting does not appear in the space provided for that purpose on the affidavit of registration, the board shall either summon the precinct election judges to come to the office of the said board and correct the voting record of such voters, or may, in their discretion, have the same corrected by the assistants of the board.

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Supreme Court of the United States

Nos. 329, 330.

MORRIS KLEIN AND HARRY BURKE,
PETITIONERS,

VS.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Supreme Court of the United States

Nos. 329, 330.

MORRIS KLEIN AND HARRY BURKE,
PETITIONERS,

VS.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

TO THE UNITED STATES SUPREME COURT, AND THE HONORABLE JUDGES THEREOF:

Morris Klein and Harry Burke, Petitioners, pray a rehearing on their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in the cases of Morris Klein, Appellant, vs. United States of America, Appellee, No. 13656, and Harry Burke, Appellant, vs. United States of America, Appellee, No. 13657 (which cases were consolidated and heard as one appeal) entered on July 21, 1949, affirming the judgments of the United States District Court for the Western District of Missouri.

OPINIONS BELOW.

The Trial Court filed a memorandum and order on August 9, 1947, overruling defendants' motion to dismiss and overruling in part defendants' motion for bill of particulars. This memorandum and order appears on pages 13 to 23 of the record. No other opinion was filed by the trial court. The opinion of the Court of Appeals is reported in 176 F. 2d 184.

JURISDICTION.

On the 7th day of November, 1949, an order was entered by this Court denying petitioners' petition for writ of certiorari, and by a timely application to this Court, an order was granted extending the time to file this petition for rehearing to and including December 21, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. A., Sec. 1254 (1). See also, Rule 37 (b) of the Federal Rules of Criminal Procedure promulgated by this Court February 8, 1946, and Rule 33 of the Rules of the Supreme Court of the United States as amended October 13th, 1947.

QUESTIONS PRESENTED.

1. Whether the trial court erred in admitting evidence over appellants' objection on matters not connected with the appellants or connected with any transaction allegedly within the purview of the indictment.

2. Whether the trial court erred in refusing defendants' requested charge No. 3 (R. 617) in charging that the defendants could be convicted of conspiracy, although there was no evidentiary basis for said charge.

3. Whether the trial court erred in denying the motions of both Klein and Burke for judgments of acquittal

for the reason that there was no substantial evidence that either defendant was a party to the conspiracy charged in the indictment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitution of the United States, Article I, Section 1.

Constitution of the United States, Amendment XVII.

Missouri Constitution, 1945, Article VIII, Section 2.

Sec. 11563, Rev. Stat., 1939.

REASONS FOR GRANTING THE PETITION FOR REHEARING.

(1) The trial court erred in admitting in evidence over the objections of the appellants, matters not connected with the appellants or connected with any transaction allegedly within the purview of the indictment.

The court erred in admitting evidence, over appellants' objection, to the effect that

(1) Lucius Carter and three other men (R. 442) rode to some point on Brooklyn Avenue, in a car driven by Bob McKissick (R. 442); there they were caused to and did, by impersonating other persons (R. 446) cast illegal votes (R. 444); that then they were driven to a Justice of the Peace office on Fifteenth Street, where they waited for a time (R. 444).

(2) Lucius Carter, Jesse Bell, Elnora Hodges (Bell) and Marjorie Jackson (R. 445) went to a point on Troost, between 11th and 12th, in a car driven by a man named Charlie (R. 445); there they were caused

to and did cast illegal votes by impersonating other persons (R. 446).

(3) Marjorie Jackson was paid for twice voting illegally (R. 464), once by the driver of the car she rode in and once by a man on Fifteenth Street (R. 464).

These alleged transactions were *res inter alios acta* as to each appellant; they were in no way connected with the appellants or any transaction allegedly within the purview of the indictment.

Thomas v. *U. S.*, 57 F. 2d 1039, 1042 (10 Cir.).
U. S. v. *Sprengel*, 103 F. 2d 876.
Nations v. *U. S.*, 52 F. 2d 97 (8 Cir.).

(2) The court erred in refusing defendants' requested charge numbered 3 (R. 617) and in charging the jury that the defendants could be convicted of conspiracy to prevent some of the legally qualified voters from receiving a ballot and voting for United States Senators or Representatives in Congress (R. 598) for the reason that there was no evidentiary basis for said charge.

Constitution of the United States, Article I, Section 1.
Constitution of the United States, Amendment XVII.
Missouri Constitution, 1945, Article VIII, Section 2.
Sec. 11563, R. S. Mo., 1939.
United States v. *Kantor*, (2 Cir.) 78 F. 2d 710.
Steedle v. *United States*, (3 Cir.) 85 F. 2d 867.
United States v. *Saylor*, 322 U. S. 385, 64 S. Ct. 1101.
Guy v. *Utecht*, (8 Cir.) 144 F. 2d 913.
E. I. Du Pont de Nemours & Co. v. *Frechette*, (8 Cir.) 161 F. 2d 318.

Akins v. *State of Texas,* 325 U. S. 398, 65 S. Ct. 1276, Footnote 1.

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Walker v. *United States,* (8 Cir.) 93 F. 2d 383, Certiorari denied 58 S. Ct. 642, 303 U. S. 644, 82 L. Ed. 1103.

(3) The court erred in denying the motions of both Klein and Burke for judgments of acquittal for the reason that there is no substantial evidence that either defendant was a party to the conspiracy charged in the indictment.

U. S. v. *Dire,* (2 Cir.) 159 F. 2d 818.

Direct Sales Co. v. *U. S.,* 319 U. S. 703, 63 S. Ct. 1265.

Crain v. *U. S.,* 148 F. 2d 615.

U. S. v. *Silva,* (2 Cir.) 131 F. 2d 247.

Kassin v. *U. S.,* (5 Cir.) 87 F. 2d 183.

Dennert v. *U. S.,* (6 Cir.) 147 F. 2d 286.

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Gerson v. *U. S.,* 25 F. 2d 49 (8 C. C. A.).

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Turinetti v. *U. S.,* 2 F. 2d 15 (8 C. C. A.).

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McDaniel v. *U. S.,* 24 F. 2d 303.

Lamber v. *U. S.,* 26 F. 2d 773.

Colbaugh v. *U. S.,* 15 F. 2d 929 (8 C. C. A.).

ARGUMENT.

The court erred in admitting evidence of illegal voting and money paid therefor that were wholly without the purview of the indictment and wholly disconected with the appellants or the alleged conspiracy, *i. e.*, of illegal voting by Lucius Carter and three other men on Brooklyn, of illegal voting by Marjorie Jackson and three other persons on Troost Avenue and of Marjorie Jackson being paid for illegally voting twice.

Each and all of the three instances of evidence mentioned in Point V of our points to be argued were wholly without purview of the indictment, not connected in any way with these appellants or any defendant in this cause; not even remotely connected with any person named in the evidence as working with or for either appellant. The court recognized the necessity of making some evidentiary connection between the perpetrators of these illegal acts and the defendants (R. 442, 444, 445); the court stated "The Court will see that the defendants' rights are preserved in that respect" (R. 445) and even manifested slight impatience at repeated objections (R. 450). Yet, this highly inflammable and prejudicial evidence went to the jury and, when the "misunderstanding" of the jury is considered (R. 626) could have and we believe did, tip the scales of justice against these appellants.

A great number of wholly disconnected persons, organizations and interests were active in this hotly contested primary (R. 140, 141). Appellants are entitled to be tried only upon evidence tending to prove that they transgressed; they should not be convicted, in whole or

part, upon evidence of transgressions by others, with which they were wholly disconnected.

U. S. v. *Sprengel,* 103 F. 2d 876 (3 Cir.).
Nations v. *U. S.,* 52 F. 2d 97 (8 Cir.).

The persons allegedly in the car driven by Bob McKissick were, under the evidence, never even in the 10th precinct of the 1st ward. None of the persons in the car driven by "Charlie" voted in said precinct, and were not even asked to vote therein. There is no evidence that this car was even caused to come to the polls in this precinct at the request of or by arrangement with either appellant. The feeble pretense of an attempted connection was the alleged statement by Klein to the driver, Charlie, *i. e.,* "We don't need any voters now. If I need any, I will let you know later" (R. 451).

The most that can be said of this evidence is that it tended to prove that Klein may have suspected that there was a conspiracy to cause illegal votes to be cast in some other part of the city and declined to become a party thereto. There was not even an abortive attempt to connect appellants with the Brooklyn Avenue incident.

The attempted connection here is not as strong as that attempted, but ruled insufficient, in the case of *Thomas* v. *U. S.,* (10 Cir.) 57 F. 2d 1039, 1042, where the court said:

> "(5) Mere knowledge or approval of or acquiescence in the object and purpose of a conspiracy without agreement to cooperate to accomplish such object or purpose is not enough to constitute one a party to the conspiracy. *Lucadamo* v. *United States,* (C. C. A. 2) 280 Fed. 653, 657; *Marrash* v. *United States,* (C. C. A. 2) 168 Fed. 225; *Turcott* v. *United States,* (C. C. A. 7); 21 F. 2d 829; *United States* v. *Lancaster,* (C. C. Ga.) 44 Fed. 896, 10 L. R. A. 333.

> The most that can be said is that Simons knew of and acquiesced in the conspiracy and was willing to enter it provided the organization was extended to Oklahoma. This was insufficient to connect him with the conspiracy charged."

The trial court erred to the great prejudice of the defendants in charging the jury they could find the defendants guilty of having prevented or caused to be prevented some of the legally qualified voters in said precinct and ward from freely receiving a ballot and voting for United States Senators or Representatives in Congress (R. 598, 610, 611) when there was no competent and substantial evidence that any qualified voter was prevented or caused to be prevented from voting for a United States Senator or Representative in Congress.

Article I, Section 1, of the Constitution of the United States provides that the electors for members of the House of Representatives of the United States Congress "shall have the qualifications requisite for elector of the most numerous Branch of the State Legislature."

Amendment XVII of the Constitution of the United States makes the same requirement as to electors for United States Senator.

Article VIII, Section 2 of the Missouri Constitution, 1945, so far as material here provides:

> "Section 2. All citizens of the United States, * * * over the age of twenty-one who have resided in this state one year, and in the county, city or town sixty days next preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people; * * *."

Sec. 11563, R. S. Mo., 1939, so far as material here provides:

> "No person shall be entitled to vote at any primary unless a qualified elector of the precinct and duly registered therein, * * * and known to affiliate with the political party named at the head of the ticket he calls for, and attempts to vote, or obligates himself to support the nominees of said party at the following general election."

The only persons who claimed they were prevented from voting were Estella Carter and George J. Gregerson. The testimony of neither Estella Carter (R. 348-360) nor George J. Gregerson (R. 273-278) shows she or he was legally qualified and entitled to vote at this primary as it fails to show either of them possessed the following required qualifications:

> (1) That either of them was over 21 years of age and a qualified elector;
>
> (2) That either of them was "known to affiliate with" either the Democratic or Republican party.
>
> The issue of their being presented was not submissible for the further reason that there was no evidence that either of them intended to vote for any candidate seeking his party's nomination for United States Senator or Representative in Congress.

As to George J. Gregerson there was no testimony he had lived in the State one year or in the city sixty days next preceding the date of this primary election.

A necessary element in the proof, which is here lacking, is that the voter who was "prevented" from voting must have had an intention or purpose to cast a vote for a candidate for United States Senator or Representative in Congress. See: *United States* v. *Kantor*, (2 Cir.) 78 F. 2d 710; *Steedle* v. *United States*, (3 Cir.) 85 F. 2d 867; *United States* v. *Saylor*, 322 U. S. 385, 64 S. Ct. 1101.

Gregerson was denied the right to vote not by Klein but by one of the election officials (R. 274, 276). Gregerson is not shown to have come in contact with Klein at any time that day.

The testimony of Estella Carter that she stood near the door of the voting place arguing for about a half hour with Klein between 6:30 and 7:00 that evening was corroborated by no one but was contradicted by Government witnesses: Foster McMullen (R. 233), Raymond Edward Haven (R. 241), Buccero (R. 509) and Morris Levine (R. 439, 440) and by defense witnesses, Rice (R. 354, 543), Presta (R. 539) and Mr. and Mrs. Ratcliff (R. 547, 548, 549, 550).

Estella Carter's failure to recall voters walking in or out of the polling place during the last half hour is astounding. The trial court found: "The evidence is that there were at least 12 votes cast between 6:30 and 7:00 o'clock in the precinct" (R. 521).

Government's Exhibit No. 7, Exhibit Book III, page 50, shows the only vote cast in the name of Estella Carter was recorded on line 285.

This Government exhibit shows her name had not been voted at 6:30 when she says Klein told her "I voted you." Her said uncorroborated statement is positively refuted by the voting records which the Government introduced and vouched for. As her name had not been voted at the time she claims this conversation took place and could not have been voted until twenty minutes or so later it is incredible that Klein would have started and maintained for half an hour an argument with her such as she relates but as to which she is uncorroborated.

The mere fact Estella Carter and George J. Gregerson were registered voters does not make a *prima facie* case as to their right to vote.

They were registered to vote in Missouri and under Missouri law. The effect of the Missouri election laws is controlled by the statutes and court decisions of Missouri. *Guy* v. *Utecht*, (8 Cir.) 144 F. 2d 913; *E. I. Du Pont de Nemours & Co.* v. *Frechette*, (8 Cir.) 161 F. 2d 318; *Akins* v. *State of Texas*, 325 U. S. 398, 6[illegible] Ct. 1276, footnote 1.

Under the law of Missouri the mere fact one is a registered voter is insufficient to carry to the jury the issue in a criminal case as to his being a qualified voter.

See the cases of *State* v. *O'Brien*, 168 Mo. 404, 68 S. W. 341, and *State* v. *Nolan*, 168 Mo. 446, 68 S. W. 346.

Webster's New International Dictionary, Second Edition, defines "prevent" as follows:

> "To forestall; to frustrate; to deprive of hope of power of acting, operating, proceeding, etc.; to ward off; circumvent."

That same work lists as synonyms: "Prevent, preclude, avert."

We therefore submit that, in any event, the evidence here is insufficient to prove Klein prevented or caused to be prevented Estella Carter from voting.

There was therefore no evidence authorizing a submission of the charge that defendants prevented qualified voters from voting for United States Senator or Congressman. The charge authorized a conviction on that issue and it is impossible now to determine that the jury did not convict on that charge. Therefore, we submit, it was prejudicial and reversible error to submit that issue and likewise prejudicial and reversible error to charge the jury that they could convict defendants on that issue.

Please see and consider in this connection *Little* v. *United States*, (8 Cir.) 93 F. 2d 401, Certiorari denied 58

S. Ct. 643, 303 U. S. 644, 82 L. Ed. 1105, and *Walker* v. *United States,* (8 Cir.) 93 F. 2d 383, Certiorari denied 58 S. Ct. 642, 303 U. S. 644, 82 L. Ed. 1103, holding to constitute a federal offense there must be interference in the election of federal officers and interference in the election of state officers is insufficient to constitute the offense.

In the case of *Dahly* v. *United States,* (8 Cir.) 50 F. 2d 37, a criminal conspiracy case, the court said (l. c. 44):

> "Our conclusion is that the evidence by which it is sought to connect Beaton with the conspiracy charged, even if a conspiracy existed, cannot be considered as substantial; at most, it amounts to a very slender suspicion.
>
> The evidence as to the case against Dahly—whether the conspiracy charged existed and whether he was a party thereto—is also entirely circumstantial."

In holding no submissible case was made, the court said (l. c. 44):

> "Without trenching upon the general rule that appellate courts will not usually weigh the evidence, yet on account of the foregoing considerations, and in view of the exceptional facts in the case, we are of the opinion that the testimony of Smith relative to the particular matters mentioned cannot be held to be substantial in any true sense of that word. 17 C. J., Secs. 3594-3596; *Sykes* v. *United States,* 204 Fed. 909 (C. C. A. 8); *United States* v. *Murphy,* (D. C.) 253 Fed. 404; *Jahnke* v. *State,* 68 Neb. 154, 94 N. W. 158; 104 N. W. 154; *Green* v. *State,* 6 Okla. Cr. 585, 120 Pac. 667; *Standford* v. *State,* 16 Okla. Cr. 107, 180 Pac. 712; see, also *Mickle* v. *United States,* 157 Fed. 229 (C. C. A. 8); *State* v. *Moe,* 68 Mont. 552, 219 Pac. 830; *State* v. *Wilson,* 76 Mont. 384, 247 Pac. 158; *Cooper* v. *State,* 130 Miss. 288, 94 So. 161.

> But even giving full credence to his testimony, yet the suspicious circumstances thus raised fall far short of being substantial evidence of the conspiracy charged and of Dahly's connection therewith."

Likewise, in this case we submit the testimony of Estella Carter is unbelievable and not substantial evidence; that in any event, it does not rise to any dignity above suspicion and conjecture and is insufficient to authorize the charge as made.

Regardless of all this, the fact that there is no evidence that either Estella Carter or George Gregerson intended to cast a vote for a Congressional or Senatorial candidate is fatal. The refusal of defendants' requested charge numbered 3 was prejudicially erroneous.

As to Burke, there was no evidence that he was working for any particular candidate or slate of candidates on the Democratic ticket. As to Klein, the undisputed evidence was that he did not tell his workers what candidates he was supporting; that he told them only to get out the vote (R. 344). There is no evidence that either Klein or Burke took any part in the Democratic inter-party contest, which was the controversy out of which this prosecution arose.

In *United States* v. *Dire*, (2 Cir.) 159 F. 2d 818, the court said (l. c. 819):

> "We have several times had occasion to consider what relation to a conspiracy makes a man a confederate, and what relation to the principals in a crime makes a man an abettor; and we have uniformly held that the prosecution must prove the accused to have associated himself with the principals in the sense that he has a stake in the success of the venture."

See to like effect *Direct Sales Co.* v. *United States*, 319 U. S. 703, 713, 63 S. Ct. 1265, 1270.

Where, as here the charge is conspiracy, it is "essential to establish the existence of a confederation or agreement" before a conviction can be sustained.

Circumstances which merely raise suspicions or give room for conjecture are not sufficient evidence of guilt.

Crain v. *United States*, 148 F. 2d 615-617.

In the case of *Cartello* v. *United States*, (8 Cir.) 93 F. 2d 412, in an election conspiracy case this court said (l. c. 414):

> "(3) Aside from this testimony of the two witnesses for the government, which certainly did not tend to prove guilt on behalf of any of the defendants, the evidence is purely circumstantial. To sustain conviction, it must not only have been consistent with the defendants' guilt, but must have been inconsistent with their innocence. *Tingle* v. *United States*, (C. C. A. 8) 38 F. 2d 573; *Langer* v. *United States*, (C. C. A. 8) 76 F. 2d 817.
>
> "(4) We again advert to the fact that aside from the evidence in support of the overt acts, there is no evidence tending to show a conspiracy among these defendants. In the absence of such proof, proof sufficient to connect one of the defendants with the erasures and alterations on these ballots would, of course, be wholly insufficient to warrant a wholesale conviction of the other defendants. A conspiracy is the gist of the offense, and that conspiracy must be proven beyond a reasonable doubt, either by direct or circumstantial evidence, or both. *Langer* v. *United States*, (C. C. A. 8) 76 F. 2d 817; *Dahly* v. *United States*, (C. C. A. 8) 50 F. 2d 37.
>
> " 'But in conspiracy cases, the unlawful combination, confederacy, and agreement between two or more persons, that is, the conspiracy itself, is the gist of the action, and is the *corpus delicti* charged. It is, therefore, primarily essential to establish the existence of a

confederation or agreement between two or more persons before a conviction for conspiracy to commit an offense against the United States can be sustained.' "

In the case of *Dennert* v. *United States,* (6 Cir.) 147 F. 2d 286, in reversing a conspiracy case the court said (l. c. 286):

"(2) Nor was there any proof that he conspired. It may not be inferred from casual and unexplained meetings between Dennert and other persons charged, that he participated or even knew of the conspiracy. *United States* v. *Falcone,* 311 U. S. 205, 210, 61 S. Ct. 204, 85 L. Ed. 128.

(3) 'Circumstances which merely raise suspicion or give room for conjecture are not sufficient evidence of guilt. Wharton on Evidence, p. 1532. A conviction resting on them alone cannot stand.' *Kassin* v. *United States,* (5 Cir.) 87 F. 2d 183, 184."

Whenever a circumstances relied upon as evidence of criminal guilt is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference guilt may be fairly deducible.

Dickerson v. *U. S.,* 18 F. 2d 887 (8 C. C. A.).
Gerson v. *U. S.,* 25 F. 2d 49 (8 C. C. A.).
Cox v. *U. S.,* 96 F. 2d 41.
Turinetti v. *U. S.,* 2 F. 2d 15 (8 C. C. A.).

In the case of *Turinetti* v. *United States, supra,* in a criminal conspiracy case the Court said (l. c. 17):

"Whenever a circumstance, relied upon as evidence of criminal guilt, is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference, guilt may be fairly deducible."

See to like effect *Roukous* v. *United States,* (1 Cir.) 195 Fed. 353 (5), and *Leslie* v. *United States,* (10 Cir.) 43 F. 2d 288, 289-290, and cases therein cited.

In the case of *Cox* v. *United States, supra,* in a criminal case the Court said (l. c. 43):

> "Evidence which is consistent with two conflicting hypotheses tends to prove neither, *Gunning* v. *Cooley,* 281 U. S. 90, 94, 50 S. Ct. 231, 74 L. Ed. 720; *Stevens* v. *The White City,* 285 U. S. 195, 204, 52 S. Ct. 347, 76 L. Ed. 699; and proof of circumstances which, while consistent with guilt, are not inconsistent with innocence, will not support a conviction, *Spalitto* v. *United States,* (9 Cir.) 39 F. 2d 782, 784; *Van Gorder* v. *United States,* (8 Cir.) 21 F. 2d 939, 942; *Cravens* v. *United States,* (8 Cir.) 62 F. 2d 261, 274; *McClintock* v. *United States,* (10 Cir.) 60 F. 2d 839, 842."

Knowledge of a conspiracy, full sympathy with an approval of its object, does not constitute one a conspirator.

McDaniel v. *U. S.,* 24 F. 2d 303.
Lamber v. *U. S.,* 26 F. 2d 773.
Colbaugh v. *U. S.,* 15 F. 2d 929 (8 C. C. A.).
Lucadam v. *U. S.,* 280 Fed. 653.
Jianole v. *U. S.,* 299 Fed. 496 (8 C. C. A.).
Thomas v. *U. S.,* 57 F. 2d 1039.
U. S. v. *Potash,* 118 F. 2d 54.
Moss v. *U. S.,* 132 F. 2d 875.
Brooks v. *U. S.,* 164 F. 2d 142.

In the case of *Brooks* v. *United States,* (5 Cir.) 164 F. 2d 142, in a criminal conspiracy case the Court said (l. c. 143):

> "(2, 3) The charge here was a blanket one that all of the defendants were parties to a single general conspiracy, and the evidence in the case as to any agreement or understanding between some of the de-

fendants at least is wholly circumstantial. In this situation, due process as to each defendant required for a conviction that the evidence be strong enough to exclude every other reasonable hypothesis than the guilt of that defendant of the precise conspiracy charged. It also required that in the reception and application of the evidence offered to prove that conspiracy, each defendant should by appropriate rulings and instructions be protected from the hazard of being convicted on the general principle apparently relied on by the government below and here that, though not shown to be guilty of the particular conspiracy charged, no legal harm would be done any defendant by convicting him upon proof that he was engaged with any other of the defendants in a separate conspiracy of the general nature of the conspiracy charged. This theory approved by the Circuit Court of Appeals in the Katteakos case was definitely repudiated in the Supreme Court. It will not be approved here."

We submit there is here wholly lacking any probative testimony that Burke knew, approved, and voluntarily, willingly, knowingly, and intentionally cooperated or agreed to cooperate in this alleged conspiracy. The necessary elements are lacking and this case should be reversed as to Burke.

The learned trial judge recognized the fact the evidence, as to Burke, was extremely weak. In his charge he stated (R. 613):

> "However, the character of the evidence as to defendants Burke and Holmes, compels me to say to you that you should sound well and carefully the evidence as to these defendants in arriving at your verdict."

We contend that by these circumstances the government failed to produce substantial evidence, rendering the issue submissible. We submit that no such conclusion can be reached on the circumstantial evidence herein, without

contravening one or both of two settled legal principles, *i. e.*:

1. A conclusion reached by piling one inference upon another inference is of no probative value.

2. Where two inferences may be drawn from a circumstance or set of circumstances, one innocent, and another incriminatory, the same does not constitute substantial evidence.

CONCLUSION.

For the foregoing reasons, petitioners respectfully urge that a rehearing be granted; that upon further consideration the order of November 7, 1949, denying the petition for certiorari, be revoked; and that the writ of certiorari issue.

Respectfully submitted,

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I, Walter A. Raymond, counsel for the above named petitioners, Morris Klein and Harry Burke, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

Walter A. Raymond
Counsel for Petitioners.